Opinion No. 44

SCHOOLS AND SCHOOL DISTRICTS: District High Schools; establishment—SCHOOLS AND SCHOOL DISTRICTS; High School District operation of high school—SECTIONS 75-3414, 75-4101, 75-4138, 75-4501, 75-4616.1, 75-4602, 75-4605, 75-4609, REVISED CODES OF MONTANA, 1947.

Held: 1. **The fact there is an accredited high school in one of the school districts of a high school district will not deprive or limit the right of any one of the other school districts comprising the high school district to petition the State Superintendent of Public Instruction for the establishment of a district high school.**

2. **A high school district is a legal entity with limited powers and is not authorized to operate a high school.**

May 25, 1962

Mr. Gene B. Daly
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Daly:

You have requested my opinion as to whether the trustees of a school district may petition the State Superintendent of Public Instruction pursuant to the provisions of Section 75-4139, RCM, 1947, for the establishment of a district high school notwithstanding the fact there is an operating high school in another school district in the high school district of which the petitioning district is a part.

Our present law authorizes school districts to establish district high schools. Such is provided in Section 75-4138, RCM, 1947, where it is stated:

> "Whenever the interests of any school district require it, the board of trustees of the district, with the approval of the superintendent of public instruction, may establish a high school and make the necessary provisions for its quarters, equipment, and teaching force in the manner provided for in Section 75-4139. . ."

The manner of initiating the establishment of a district high school is by petition to the superintendent of public instruction and the facts to be presented are specified in Section 75-4139, RCM, 1947. This statute grants to the State Superintendent of Public Instruction discretionary authority as to the propriety and necessity of a high school in the petitioning district.

The problem presented by your question is the effect of the high school district law on the above statutes and, in particular, whether an existing operating high school in a high school district will preclude the establishment of a second district high school within the boundaries of the high school district.

Our first high school district law was passed by the legislature as Chapter 47, ex Laws of 1933, and was subsequently reenacted with some amendments as Chapter 275, Laws of 1947.

That high school districts are established for the limited purpose of borrowing money to make capital improvements is expressed in Section 75-4605, RCM, 1947, in the following language:

> "This act shall not prevent the exercise of powers as elsewhere in the statutes of this state provided. It shall constitute an additional and cumulative method of borrowing money and of carrying out the powers herein authorized. The high school districts created under the provisions of this act, are for construction, repair, improvement, and equipment purposes only, and it shall not be construed so as to interfere with or repeal any existing laws relating to the maintenance or operation of high schools within the county."

The above quoted appeared in substantially the same form in Chapter 47, ex. Laws 1933, and has continued to be the law pertaining to high school districts without variation. The first sentence of Section 75-4605 would certainly negative an implied repeal of Section 75-4138, RCM, 1947.

While it would appear cumbersome to have more than one high school in a high school district, yet there is nothing in the high school district law which prohibits the establishment of two or more high schools in one high school district. This is made apparent when Section 75-4602, RCM, 1947, is considered as it authorizes a commission to divide a county into high school districts and states:

> ". . . that each high school district so formed must have one (1) or more operating accredited high schools within its boundaries."

By enacting this statute legislative approval was given to high school districts with more than one high school.

This office, in Opinion No. 2, Volume 27, Report and Official Opinions of the Attorney General, stated:

> "There may be more than one operating, accredited high school in a high school district and the board of trustees of each high school has concurrent jurisdiction with any other board of trustees of a high school in the affairs of the high school district."

It has been urged that the enactment of legislation, such as Sections 75-4609, 75-3414, and 75-4516.1, RCM, 1947, as amended, which permit the use of the area encompassed by a high school district for the imposition of taxes to support and maintain high schools has resulted in designating the high school district as the entity which operates and maintains high schools. If such a conclusion is correct then there are many repeals by implication of statutes fixing the powers and duties of the trustees of districts maintaining high schools. However, in Section 75-4516.1, RCM, 1947, as last amended by Chapter 246, Laws of 1961, provision is made for a county-wide high school ten mill levy and also for additional levies which must "in the case of a district high school located within a building district, be levied upon all property in such building district." By recognizing the continued existence of the district high school, although approving the use of the high school district for tax purposes, the legislature did not alter the status of the district high school as the operating unit. Similar recognition of the school district as the operating entity appears in Sections 75-4609 and 75-3414, RCM, 1947. In any event, it is the board of county commissioners and not the board of trustees which levies taxes on the county and high school district for high school purposes.

The election of additional members to the board of trustees of districts maintaining high schools does not enlarge the scope of the high school district act. It should be observed that Section 75-4601, RCM, 1947, in permitting the election of additional trustees, specifically states, ". . . members may be elected to the board of trustees of districts maintaining district high schools . . ." from the districts outside of the district where the high school is located. The language used clearly acknowledges that such additional trustees participate with the trustees

of the district maintaining the high school without any implication of any alteration of status of the high school as a district high school.

The further contention has been made that, if the trustees of the school district in which the high school is located administer the school without any provision for the election of trustees from the entire building district, property will be taken without due process of law. This was disposed of by our Supreme Court in the case of Lorang vs. High School District "C," 126 Mont. 204, 247 Pac. 2 477, where it was said:

> "It is the contention of appellants that since the trustees of the district in which the high schools are located will administer the school, rather than a board of trustees elected by all the qualified electors of the entire building district, it deprives them of their property without due process of law, in that they have no voice in selecting the board of trustees. Unless the Constitution otherwise provides, the legislature may provide for the choosing of members of the board of trustees of a school district as it sees fit."

Montana high schools have been defined in Section 75-4101, RCM, 1947, as last amended by Chapter 250, Laws of 1957, and this statute reads in part as follows:

> "A high school is a public school as defined in the general school laws and is an integral unit of the public school system which comprises some one or more of the grades of school work intermediate between the elementary schools and the institutions of higher education of the State of Montana, and which has its own administrative head and corps of teachers under the direct superivsion either of a district superintendent and the board of trustees of a school district, or of a county high school principal and board of trustees of such county high school, as the case may be."

The above quoted in no manner recognizes high school districts as operating units and it would be difficult to contend to the contrary in view of the language used.

Another difficulty would arise if high school districts were considered as operating units in the preparation of budgets under the High School Budget Act. Section 75-4501, RCM, 1947, of the act states,

> "This act shall apply to all districts maintaining district high schools and to all county high schools."

By designating district high schools and county high schools as the high schools which adopt budgets high school districts as operating units are eliminated and cannot adopt budgets under Chapter 45 of Title 75, RCM, 1947.

It is therefore my opinion that:

1. The fact there is an accredited high school in one of the school districts of a high school district will not deprive or limit the

right of any one of the other school districts comprising the high school district to petition the State Superintendent of Public Instruction for the establishment of a district high school.

2. A high school district is a legal entity with limited powers and is not authorized to operate a high school.

Very truly yours,
FORREST H. ANDERSON
Attorney General